VERMONT LABOR RELATIONS BOARD

SOUTH BURLINGTON BOARD OF SCHOOL DIRECTORS	)	
v.	)	DOCKET NO. 11-33
SOUTH BURLINGTON EDUCATORS' ASSOCIATION AND VERMONT-NEA	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On May 23, 2011, the South Burlington Board of School Directors ("School Board") filed an unfair labor practice charge against the South Burlington Educators' Association ("SBEA") and the Vermont-NEA, contending that the SBEA and the Vermont-NEA violated 21 V.S.A. § 1726(b)(2) and (4) by their actions. Specifically, the School Board contends that: 1) the Association and Vermont-NEA violated Section 1726(b((2) through the sending of an e-mail by the Vermont-NEA Executive Director to the School Board Chairperson which was designed to threaten, intimidate and coerce the School Board Chairperson and restrain and coerce the School Board in its selection of representatives for the purposes of collective bargaining by inappropriately creating an actual conflict and/or the appearance of a conflict of interest for the School Board Chairperson; 2) the Association and Vermont-NEA engaged in a failure to negotiate in good faith in violation of Section 1726(b)(4) by the Vermont-NEA Executive Director making express and implied threats in the e-mail to the effect that the SBEA and/or Vermont-NEA would cause harm to the School Board Chairperson's personal livelihood by picketing his office and causing him to lost union business unless he convinced the School Board to succumb to their demands: and 3) the actions of the SBEA and

Vermont-NEA amounted to a failure to bargain in good faith in that the threatening e-mail was made through direct, *ex parte* contact with the School Board Chairperson in violation of the parties' negotiation ground rules regarding designated representatives and spokespersons and without permission of the School Board's legal counsel.

The Vermont School Boards Association ("VSBA") filed an application to intervene in this matter on May 23, 2011.The SBEA and Vermont-NEA filed a response to the charge on June 21, 2011. The School Board filed a reply to the SBEA's and Vermont-NEA's response on July 8, 2011. The SBEA and Vermont-NEA filed a reply to the School Board's reply on July 19, 2011.

On August 19, 2011, the Labor Relations Board issued an order granting the application to intervene filed by the VSBA to the extent of allowing the VSBA to file a post-hearing memorandum of law in this matter and denying the application to the extent that VSBA seeks any further intervention in this matter. The Labor Relations Board also issued an unfair labor practice complaint on August 19, 2011.

The Labor Relations Board held hearings on the complaint on October 20, 2011, and November 21, 2011, in the Board hearing room in Montpelier before Board Members Richard Park, Chairperson; James Kiehle and Gary Karnedy. Attorney Jeffrey Nolan represented the School Board. Attorney Alan Biederman represented the SBEA and Vermont-NEA. Attorney John Hollar was present during the hearings as a representative of the VSBA. The VSBA filed a post-hearing memorandum of law on December 9, 2011. The SBEA and Vermont-NEA filed Proposed Findings of Fact and Conclusions of Law on December 12, 2011. The School Board filed Proposed Findings of Fact and Conclusions of Law on December 13, 2011.

Prior to issuing the decision in this matter, the Labor Relations Board panel hearing the case sent a draft of the decision to the remaining three members of the Board for their review pursuant to 3 V.S.A. § 921(d), which provides: "The board may review a proposed decision by a panel prior to its issuance for the sole purpose of insuring that questions of law are being decided in a consistent manner." As a result of this review, there were no changes made in the decision.

FINDINGS OF FACT

1. The SBEA, affiliated with the Vermont-NEA, is the exclusive bargaining representative of the teachers employed in the South Burlington School District. Vermont-NEA is the Vermont chapter of the National Education Association. Vermont-NEA includes more than one hundred and forty local affiliates. Vermont-NEA provides assistance and support to its affiliates, including assistance during contract negotiations. The School Board is the employer of the teachers employed in the South Burlington School District.

2. 16 V.S.A. § 563 (20) provides: "The school board of a school district . . . shall establish policies and procedures designed to avoid the appearance of board member conflict of interest."

3. The School Board has had policies at all times relevant to this matter which contained the following provisions:

> **4.5 Board Members' Code of Conduct**
> . . .
>
> 5. The board commits itself to ethical, businesslike, and lawful conduct, including proper use of authority and appropriate decorum when acting as board members. Accordingly:
>
> a. Board members will represent the interests of the citizens of the entire school district. This accountability to the whole district supersedes:

- Any conflicting loyalty a member may have to other advocacy or interest groups.
- Loyalty based upon membership on other boards or staffs,

. . .

b. Members must avoid conflicts of interests as well as the appearance of conflicts of interest. **Conflict of interest** means a situation when a board member's private interests, as distinguished from the board member's interest as a member of the general public, would benefit from or be harmed by a board decision.

. . .

Implementation

In order to comply with the obligations thus imposed, the Board and its members will adhere to the following standards.

. . .

4. A Board member will not give the impression that his or her position on any issue can be influenced by anything other than a fair presentation of all sides of the question.

. . .

Avoiding Conflicts

. . .

When a Board member becomes aware that he or she is in a position that creates a conflict of interest or the appearance of a conflict of interest as defined in state law or this policy, he or she will declare the nature and extent of the conflict or appearance of conflict for inclusion in the Board minutes, and will abstain from voting or participating in the discussion of the issue giving rise to the conflict.

. . .

(School Board Exhibit 14)

4. Attorney Richard Cassidy was Chair of the School Board at all times relevant. Cassidy is a principal in the Burlington law firm of Hoff Curtis. Cassidy has represented labor unions since 1982 as part of his law practice. Cassidy was involved in the drafting of the above-cited conflict of interest policy during his School Board tenure. Cassidy has been on the School Board since 2000. Before Cassidy first sought election to the School Board, he considered it possible that unions could picket his law office if he served on the School Board. He decided that it would be acceptable if picketing resulted in loss of union clients.

5. Richard Wise is a teacher in the South Burlington School District and is co-President of the SBEA. He has been either co-President or President of the SBEA for approximately 20 years. Wise also has been a member of the Vermont-NEA Board of Directors for approximately 12 or 13 years. Kathy Buley is an elementary school teacher in the South Burlington School District and is co-President of SBEA.

6. The School Board and the SBEA were parties to a two-year collective bargaining agreement with an expiration date of June 30, 2010.

7. The School Board and the SBEA agreed to negotiations ground rules for a successor agreement to the 2008-2010 agreement on February 16, 2010, which provided in pertinent part:

> The South Burlington Board of School Directors ("Board") and the South Burlington Education Association ("SBEA") agree that the following ground rules shall apply to their negotiations for a successor collective bargaining agreement to the Agreement expiring June 30, 2010.
>
> > 1. The authorized representatives of the Board and the Association will meet in person to negotiate the successor agreement. Each side will appoint its spokesperson, who will direct the discussion for his/her negotiation team. Other team members may speak with their spokesperson's acknowledgment. Ex-officio members of the Association and Board teams may attend meetings but shall not actively participate in discussions unless invited.
> > . . .
> > 11. During the first meeting on February 16, 2010 the Parties shall agree upon a schedule of meeting times/dates for negotiations meetings. Each party will designate an exclusive contact for logistical and formal communications. If a meeting must be canceled or delayed due to unforeseen circumstances, the party initiating the action will notify the designee of the other party as soon as possible. The designated person for the Board shall be Superintendent John Everitt; the designated person for the SBEA shall be Eric Stone. Each Party shall be responsible to notify the members of its negotiating team when there is a change of schedule.
> > . . .
> > (School Board Exhibit 23)

8. Eric Stone is a math and science teacher in the South Burlington School District and was the chief negotiator for the SBEA during negotiations for the successor agreement to the 2008-2010 agreement. He was the SBEA's designated spokesperson pursuant to the negotiation ground rules. The School Board's negotiating team consisted of all members of the School Board, South Burlington School District Superintendent John Everitt and Attorney Scott Cameron. Cameron was the School Board's designated spokesperson pursuant to the negotiation ground rules. Cassidy attended most of the negotiations sessions and made his views on disputed issues known to the SBEA negotiating team.

9. The parties reached impasse in negotiations for a successor agreement to the 2008-2010 agreement. After the parties reached impasse, Vermont-NEA Uniserv Director David Boulanger joined the SBEA negotiation team. He remained involved in negotiations from that point until their conclusion. Boulanger represented the SBEA during the mediation and fact-finding processes. The parties met with a mediator on May 28, 2010. When the parties still were unable to reach agreement, they hired Bruce Fraser as fact-finder. Fraser issued his fact-finding report and recommendations on July 15, 2010 (SBEA and Vermont-NEA Exhibit I).

10. The most significant area of disagreement between the School Board and the SBEA concerned the issue of step increases for teachers. Teachers were entitled to vertical step increases based on experience, and horizontal increases based on education, during the term of the 2008-2010 agreement, and would continue to receive such increases during the interim period after the expiration date of an agreement if a new agreement had not reached and negotiations had not been concluded. The School Board

made a proposal during fact-finding to amend the salary provisions of the agreement to provide that "the parties agree that there shall be no vertical movement within column during the 2010-2011 school year, and until otherwise negotiated." The SBEA opposed this proposal, and took the position to retain automatic vertical step increases. The fact-finder recommended that the School Board withdraw this proposal (SBEA and Vermont-NEA Exhibit I).

11. SBEA leaders viewed Cassidy as the major impediment to the progress of negotiations. Boulanger also viewed Cassidy as an impediment to settlement of an agreement.

12. The SBEA formed a "Crisis Committee" during negotiations to help the leadership formulate strategies to bring bargaining to a favorable close. The Crisis Committee met on October 28, 2010. The meeting was chaired by Greg Wolf. SBEA Co-President Wise attended the meeting. He indicated at the meeting that Cassidy was an impediment to the negotiation process. The minutes of the meeting prepared by Committee member Lori Dow-Moore identified several "potential action steps" for the future. One of the potential steps mentioned was an organized picket in front of Cassidy's residence and place of employment. The meeting minutes also identified as one of the "Immediate Action Steps" the following: "A letter will be written by the leadership/membership and sent to The Other Paper to *target* Cassidy". *The Other Paper* is an on-line South Burlington community newspaper (School Board Exhibit 5, emphasis in original).

13. Dow-Moore sent the meeting minutes to Crisis Committee members on October 28. On October 29, after reviewing the minutes, SBEA co-President Buley sent the following e-mail message to the Crisis Committee members:

> I'm sorry to have missed the meeting – I had a previous commitment at VTNEA in Montpelier. While I support most of what is reflected in the minutes, I want to make it perfectly clear that I do NOT support picketing Richard Cassidy's office or house, or targeting him on a personal level. We are too smart for that, and I simply will not participate in activities that are intended to intimidate someone on a personal level. A carefully crafted resolution that takes a vote of no confidence in the Board because they are allowing the negotiating process to be highjacked by Cassidy could be as effective without taking such a low road as a personal attack, which to a lawyer is just an invitation to the dance – we will live to regret it. Back to the essential Laurie Huse question: "what are we hoping to accomplish?" that's my opinion, and I just needed to be clear about it.
> (School Board Exhibit 12, SBEA and Vermont-NEA Exhibit F)

14. Crisis Committee Chair Wolf sent the following e-mail message on October 30 in response to Buley's e-mail:

> Kathy, while I have no problem with beginning to target Cassidy (as I perceive him as the single impediment to a settlement based on the current information that I have), I want to point out that these are just the suggestions made by VTNEA. I asked the question of Emma, what would we do ***if*** we wanted to move toward this level of action. I'm not proposing that we act on all of these suggestions. I have no issue with the idea of targeting him in a LTE, but I don't think that it's time to picket his office, at least not yet. Hope this clarifies.
> (School Board Exhibit 12, SBEA and Vermont-NEA Exhibit F, emphasis in original)

15. Upon reviewing Buley's and Wolf's e-mail messages, Wise sent the following e-mail message on October 30 to the Crisis Committee members:

> I also have no problem with beginning to put the spotlight on the chair of our board. What that looks like should be discussed with the entire crisis committee. I'm certain we'll end up doing what we always do – making good decisions that are in our members best interests.
> (School Board Exhibit 12, SBEA and Vermont-NEA Exhibit F)

16. Buley sent the following e-mail response on October 30:

> Thank you for your media ready response, Mr. President, and your unstated reprimand is duly noted. I'm just being clear about where I stand on the issue, so there's no confusion later on – I am not suggesting that the crisis committee will not do what they decide to do. But if it involves picketing Richard Cassidy's house or office, we look like a bunch of thugs, and he becomes a victim. So count me out. This idea comes out at some point in every cycle like a bad penny, and I just wish we would put it to rest. Within this small leadership group, I am being perfectly honest.
> (School Board Exhibit 12)

17. Wise responded with the following November 1 e-mail message:

> Thanks for your thoughtful feedback. I understand that picketing a board members house or office is not an action you support. Just to make you feel better, that's not something we've talked about. As I've mentioned – we'll proceed in a deliberate and thoughtful manner. Every action will have the support of the crisis committee.
> (School Board Exhibit 12)

18. On December 2, 2010, the following statement from Cassidy was included in *The Other Paper*:

> Dear Residents of South Burlington
>
> Recently the School Board reported on the status of the teacher negotiations in *The Other Paper*, comparing each party's position against the fact-finder's recommendations. . .
>
> The difference in our positions may seem insignificant. In fact, a structural difference with the SBEA-VT NEA risks unsustainable future costs.
>
> Our teachers' contract, like many in Vermont, includes a salary schedule providing vertical and horizontal pay increases ("steps") in addition to any base pay increases. The number of years of service (vertical steps) and more education (horizontal steps) a teacher attains in a given year determines the teacher's placement on the salary grid and the resulting "step" increases received that year.
>
> This feature has been part of the contract for many years. It helps the District recruit and retain excellent teachers. The Board is not seeking fundamental change to this system.
>
> However, one feature of this system puts the community at a significant disadvantage in the negotiation process. Years ago the Vermont Labor Relations

Board ruled that where a collective bargaining agreement provides for annual, vertical step movement, a Board is nevertheless required to award teachers step movement after the contract expires, and while the parties are still negotiating the successor agreement.

Last winter, the Board began negotiations seeking agreement before the contract expired on June 30, 2010. When no agreement was reached by that date, the District was required to provide step increases according to the old schedule. Teachers who did not reach a step increase for this year received no raise. But most teachers did get increases, which averaged 1.8% These automatic salary increases cost $298,571 while revenues to the District decreased.

During times of economic uncertainty, this seems unfair to our community. If teachers receive automatic salary increases, and revenues decrease, something else will have to give. That "something" will likely be the scope or quality of our educational programs.

Because automatic salary increases may harm education, changing this practice is our primary goal for this negotiation. We maintain that negotiated step increases are a good way to compensate career teachers. To the extent the financial condition of the District permits, we plan to continue such schedules as part of an agreement, but not without one.

We ask our community for its support.
(School Board Exhibit 31)

19. The SBEA submitted letters and articles to local news outlets expressing views on the failure to reach an agreement on a successor agreement.

20. Cassidy authored a letter included in *The Other Paper* on February 10 which provided in part:

. . .
It appears to be the view of a strong majority of the Board that language must be added to the proposed contract to reform the "automatic" nature of step increases. Without this change, the clock always runs against taxpayers in negotiations with the SBEA because teachers receive a significant pay increase if no new agreement is reached before commencement of a new school year.

This year, the terms of the existing contract provided more than 65% of our teachers with automatic pay increases. Meanwhile, the District continues to pay 88% of the cost of health insurance, without realizing the benefit of any concession that might be reached at the bargaining table. We do not believe any party in a negotiation should be advantaged by delay.

> The Board is not opposed to step increases. In fact, its most recent proposal included a second year with a 1.8% step increase. But the recession has highlighted to the Board that, in its role as a fiduciary for the taxpayers, it cannot accept automatic compensation increases when the outlook appears to be that state and federal revenue to the District will be decreasing. Program erosion and staff cuts would be the likely result.
> . . .
> (SBEA and Vermont-NEA Exhibit C)

21. A South Burlington resident and a teacher at Burlington High School sent an e-mail to Cassidy concerning negotiations between the South Burlington Board of School Directors and the SBEA. Cassidy sent an e-mail response to him on February 11, 2011. Included among his statements in the e-mail were the following: "It would not feel fair to me to raise . . . taxes to pay more money to what is already, by most measures, the best paid teaching staff in Vermont. Nor does it seem right to me to agree to permit teachers to continue to get raises without the Board's agreement, when the outlook is for declining state support for education. If our salary and benefit expenses rise, but our revenues decline, we will have to gut programs and layoff staff. I don't think it would be in the best interests of our community, including your daughters, to do this" (School Board Exhibit 7).

22. SBEA Co-President Wise received a copy of this e-mail response of Cassidy. After reviewing it, he sent an e-mail message to Cassidy on February 13, 2011. Included among his statements in the e-mail was the following in reference to the ongoing negotiations dispute between the School Board and the SBEA: "Might one argue that you, as a labor lawyer, have a fiduciary interest in the outcome of this dispute in your own practice, and should therefore recuse yourself?" (School Board Exhibit 7).

23. Cassidy sent a February 14 e-mail response to Wise's February 13 e-mail message. In response to the above question posed by Wise in his e-mail message, Cassidy stated: "This is at least the second time that you have mentioned my status as a labor lawyer in connection with this negotiation. I don't really understand what you mean. I will tell you that more than once it has occurred to me that I risk my union clients by taking a position I believe in during this negotiation. I was only able to run for the Board and stay on it because my respect for the union movement tells me that my clients will permit me to speak and vote my conscience without expecting that they will doubt my genuine commitment to the union movement.." (SBEA and Vermont-NEA Exhibit E).

24. The School Board voted 3 - 1 at its February 16 meeting to impose terms and conditions of employment on teachers for the 2010-2011 school year pursuant to 16 V.S.A. §2008, which provides that "all decisions of the school board regarding matters in dispute in negotiations shall, after full compliance with this chapter, be final". Included among its provisions were: a) 2.8% new money consisting of a 1% increase to base pay in addition to a 1.8% increase due to the step pay plan; b) teacher contribution to the cost of providing health insurance increased from 12% to 15%; and c) language indicating that after expiration of the imposed terms and conditions of employment for 2010-2011, and until a new agreement is reached, teachers would not receive automatic step salary increases. Cassidy, as Chair of the School Board, did not vote on the imposition of terms and conditions of employment because it was customary for the Chair not to cast a vote unless there was a tie vote. If he had voted, he would have voted in favor of imposition. Cassidy stated at the February 16 meeting: "I believe that this Board must impose a contract". He also stated: "We have been told that our teachers will strike if we take this

action. We hope that does not happen. That is, of course a decision our teachers must make." Stone had previously told Cassidy that there would be a strike if the School Board's position on step increases was implemented (SBEA and Vermont-NEA Exhibits C, D).

25. Attorney Joel Cook has been Executive Director of Vermont-NEA since 2000. Prior to becoming Executive Director, Cook was General Counsel for Vermont-NEA and represented Vermont-NEA and its affiliates in many cases arising under the Labor Relations for Teachers Act and the Municipal Employee Relations Act. Cook had no involvement in the South Burlington negotiations prior to February 25, 2011. Boulanger had informed Cook earlier that the School Board was considering imposition of terms and conditions of employment. He told Cook that he and the SBEA negotiators viewed Cassidy as the most significant obstacle to settlement of an agreement.

26. Cook knew that Cassidy did labor and employment law work. Cassidy knew Cook based on his work as General Counsel and Executive Director of the Vermont-NEA, and because Cook was facilitator for a coalition of Vermont unions. Cassidy had once discussed with the coalition a proposal he was involved with to amend the Arbitration Act.

27. Sometime during the week preceding February 25, 2011, Cook and Wise saw each other by happenstance in South Burlington. Wise told Cook that the South Burlington teachers would strike in the absence of an agreement. Cook stated that he may try to write something addressing the situation in South Burlington. Wise indicated this would be fine if Cook thought it would help.

28. On February 25, 2011, Cook drafted an e-mail message to Cassidy. Before sending it to Cassidy, Cook sent it to Boulanger for his approval. Boulanger approved but urged Cook to obtain approval of the SBEA before sending it. Cook forwarded the e-mail to Wise at 12:52 p.m. on February 25 accompanied by the following e-mail message:

> Hi Rich. I drafted the message below. I want to know if I send it, and you, Kathy, and Eric hold the answer. I won't send anything without your approval. I don't have Kathy's or Eric's address with me (I'm in Maine), so if you would do the honors, I'd appreciate it. If I'm to send it, then, pretty obviously, the sooner the better.
>
> I've run this by David. If it's OK by you folks, its OK by him. We've discussed whether it's a good idea for me as Executive Director to weigh in – also, is it a precedent? Every situation is different. I happen to know Rich C, he happens to have an unusual background for someone staking out the position he has. The situation feels unique.
>
> Anyhow, please advise. Thanks,
>
> Joel
>
> (School Board Exhibit 11)

29. Wise sent the following e-mail response to Cook at 1:38 p.m. on February 25: "Thanks, Joel. Send it. It's awesome – and we appreciate the support very much". At 1:43 p.m., Wise sent a copy of Cook's draft e-mail to Buley and Stone, as well as SBEA activists Gregory Wolf and George Cannon. Stone did not see Cook's e-mail before Cook sent it to Cassidy (School Board Exhibits 11, 24).

30. Cook sent the e-mail to Cassidy on Friday, February 25, 2011, at 2:01 p.m.. He did not send copies to other School Board members or Cameron. It provided in its entirety:

> Rich:
>
> I hope you receive this in the spirit in which it is written. We don't know each other particularly well, but I believe there's enough there to make this effort

potentially worthwhile. It is, of course, about the South Burlington imposition of finality. This is part personal and part professional.

I came to Vermont in January, 1975, fresh from law school, looking for work in a new state (another story). The first door I entered around lunchtime, and a voice called out. I followed it to an interior space and was greeted by a man I did not know, and he engaged me in a lengthy, helpful conversation that left me feeling upbeat about my prospects generally (although his firm was not hiring at the time). He did tell me his name was Phil Hoff. He did not mention he was the former Governor of our state. That was my first encounter with the profession in Vermont. I moved on and made a career here otherwise, one that included many professional interactions with Phil and also with David Curtis, who also was an icon for those of us in the profession for the public good.

This stroll through bits of my past is occasioned by my coming across the lead statement in the Labor & Employment page of the Hoff Curtis website: "Hoff Curtis is one of the few law firms in Vermont that represents labor unions." At the bottom of that page, the only name mentioned is yours and, as you know, your bio includes a listing of many unions you yourself have represented.

So, what's that all about? To me, sitting atop one of the other "law firms" that represents labor unions, the immediate future appears to be one that includes labor unions picketing the offices of Phil Hoff and Dave Curtis, and, frankly, I don't want that to happen.

My understanding is that you led the school board to impose finality because of your conclusion imposing no post-expiration step movement, in the absence of a negotiated agreement to that effect, is the only way to achieve that result and comply with the status quo doctrine. I've heard that you conclude that the negotiating table is somehow "permanently tilted" toward teachers as a result. That leads to three thoughts:

If you're correct on the law, is it really important enough to put your community through a strike no one, including your teachers, wants? That's for you to determine, but I've become convinced there will be a strike if the imposition is not lifted.

My understanding of the law as it relates to step movement may be a bit different from yours. I was counsel for the Association in most of the Labor Board cases on the subject. When one examines the position on step movement staked out by our Labor Board compared with that of other states, it becomes apparent that (a) the majority rule, as here, supports a "dynamic" status quo, providing for post-expiration step payment, but (b) it is conditioned here on a number of factors that mitigate the so-called "automatic" nature of step movement. In particular, a union's unreasonable delay in negotiations could (and, frankly, should) lead to a conclusion of bad faith and denial of post-expiration step payments. I believe

> memorializing that in the terms of a settlement could provide you both some satisfaction and a justification in moving toward a settlement and would make plain[er] to everyone that post-expiration step payments are dependent on people engaging with one another in good faith.
>
> Finally it is untested legal theory that the terms of impositions change the status quo (the distinction between an expired contract reflecting the most recent agreement of the parties and an "expired" employment policy imposed by one party on another). Forcing a community through a strike based on the assumed lawfulness of a unilateral approach to changing the status quo makes this seem all the more questionable to me.
>
> At any rate, Rich, there you have it. Again, I hope you appreciate the spirit in which I write. If you would like to discuss any of this, please feel free (although, of course, not regarding the negotiations themselves). Thanks for listening.
>
> Joel
> (School Board Exhibit 1)

31. The SBEA had no plans to picket Cassidy's office at the time Cook sent his e-mail to Cassidy. Boulanger was aware that the SBEA had no such plans.

32. Cassidy was aware prior to receiving Cook's e-mail that union picketing at his office was a possibility. He had mentioned such possibility to School Board members after they had taken action on February 16 to impose terms and conditions of employment on teachers.

33. Cassidy sent the e-mail message he received from Cook to South Burlington School District Superintendent John Everitt. He also sent it to Scott Cameron, the attorney representing the School Board in negotiations with the SBEA. Cassidy shortly thereafter distributed it to the other members of the School Board.

34. Cassidy did not consider the issue of a conflict of interest for him due to Cook's e-mail until Saturday, February 26, the day after he received the e-mail. Cassidy consulted with Cameron on the weekend following his receipt of the e-mail from Cook to

discuss whether the e-mail created a conflict of interest for him under the School Board's conflict of interest policy.

35. On Monday, February 28, 2011, Cassidy issued a statement providing in its entirety as follows:

> On Friday afternoon I received an e-mail message pointing out that I am a lawyer and have regularly represented labor unions other than the Vermont Education Association/National Education Association and its local affiliate, the South Burlington Education Association. The e-mail went on to suggest that in light of the possibility of a teacher strike in South Burlington, "the immediate future appears to be one that includes labor unions picketing" at my offices.
>
> I immediately forwarded this communication to the Superintendent of Schools, and the Board's attorney, and after consultation, forwarded it to other members of this Board.
>
> Over the weekend, it occurred to me that, because of this communication, a reasonable person might believe that my personal interests would require that I back away from the position the Board has taken. I do not feel this way, but I understand that other persons might doubt my ability to make a decision based solely on the merits.
>
> I consulted legal counsel for the District and have been advised that since my personal interests appear to be involved, the e-mail message does create a conflict of interest for me and that I should act in accordance with the Board's policy on this subject. I feel that I should accept our attorney's advice.
>
> Our conflict of interest policy requires that I "declare the nature and extent of the conflict or appearance of conflict for inclusion in the board minutes and will abstain from voting or participating in the discussion of the issue giving rise to the conflict."
>
> Accordingly, I will abstain from any further voting or discussions relating to the imposition of a contract for this year.
>
> I regret that this e-mail prevents me from continuing to serve the South Burlington School District on this issue.
> (School Board Exhibit 2)

36. There is no evidence that any SBEA leader or activist was aware of the School Board's conflict of interest policy at the time Cook since his e-mail to Cassidy.

Cook and Boulanger were not aware of the conflict of interest policy. Cook and Boulanger did not discuss the issue of Cassidy's conflict of interest, and neither of them discussed the issue with SBEA leaders or activists, prior to Cook sending the February 25 e-mail to Cassidy.

37. Vermont-NEA considered what public response to make as a result of Cassidy's announcement. In an e-mail message to Cook and Darren Allen, Vermont-NEA Director of Communications, Boulanger stated: "No one raised any 'conflict' issue here other than the conflict between Cassidy's ego and the welfare of the school district." The Vermont-NEA issued a media statement on March 1, 2011, authored by Allen, which provided in its entirety:

> *The following is a statement in response to South Burlington School Board Chairman Richard Cassidy's decision to remove himself from any further involvement in contract negotiations:*
>
> It is clear to us that Richard Cassidy is manufacturing reasons to distance himself from his role in walking away from contract talks with the teachers of South Burlington. The board's decision to have him abstain from any further bargaining, is, of course, welcome, given his key role in taking the city's school board down a road it has never traveled, namely unilaterally deciding to end negotiations and impose working conditions on the men and women who teach the city's children.
>
> Vermont-NEA Executive Director Joel Cook's e-mail was a sincere attempt to let Mr. Cassidy know that there are ramifications to a teachers' strike that could look bad for Mr. Cassidy and his law firm, a law firm that has represented labor in the past and has a strong track record of defending the rights of working men and women.
>
> Inevitably, one of the tools used by unions in a strike is picketing, and it is not uncommon for board members' businesses to be picketed during a strike. Mr. Cook merely pointed that out to Mr. Cassidy.
>
> We believe Mr. Cassidy is overreacting to Mr. Cook's e-mail. That(sic) spirit of the e-mail was one of trying to persuade Mr. Cassidy to reopen negotiations with South Burlington's teachers rather than simply walking away. Mr. Cook's aim – like that of the South Burlington Educators' Association – is to try prevent a walk-out by persuading the board to get back to the negotiating table.

> We believe that Mr. Cassidy has created his own conflict of interest because, as he said, his partners don't like the prospect of their respected law firm's loss of its hard-won reputation. We believe the best way to prevent that from happening is for the board upon which Mr. Cassidy sits to return to the table today.
>
> Theatrical press releases by the board's chairman, unfortunately, do nothing to resolve the issues at hand. We would urge the rest of the board to spend its energies in the coming days to working with the teachers to prevent any disruption of the school year.
> (School Board Exhibits 4, 13)

38. School Board Member Angela Clift was standing outside of the polling place on Town Meeting Day on March 1. She was running for re-election to the School Board. Clift had separate conversations at the polling place with Buley and Wise. Buley told Clift that SBEA was not aware of the e-mail before it was sent, had nothing to do with it and did not support it. Wise told Clift that SBEA had nothing to do with the e-mail sent by Cook and that SBEA did not support it. Julie Beatty, a candidate for the School Board, was standing with Clift at the time of her conversation with Wise and heard the statements Wise made to Clift. Beatty was elected to the School Board. Clift was not re-elected.

39. Buley sent an e-mail message to Cook and Boulanger on March 1, 2011, which provided:

> Rich is in Keene today, but in communication with him, we wanted to let you know of some events that have been taking place. We have been receiving phone calls from members telling us that at last night's community meeting, Agnes Clift was sharing the information that Richard Cassidy was removing himself from negotiations entirely because of "threats he has been receiving from the union". She apparently had a copy of the email sent from you, Joel, to Cassidy, and was showing it around, and was particularly highlighting the section about picketing his office.
>
> This morning I received two calls telling me that she was further discussing it at the polling area at the middle school. (I will add that our members wanted reassurance that we would not in fact be picketing personal homes or places of business)

> I went over to the middle school and told Agnes that I have been receiving calls from people, and that I wanted to make it clear that this issue was between Joel and Richard Cassidy, and that the distinction needed to be made between a communication with VTNEA, and with the SBEA. The SBEA had no plans and has had no conversations about picketing anyone at their home or place of business. I explained that while I was one person and could not speak for a membership who could conceivably over-ride me, there was no current plan to do so. I also cautioned her not to infer what Joel's reference was alluding to – that he may have been suggesting that other labor groups might take issue with his position in South Burlington.
>
> Anyway, I think I know my membership, and I am confident that they would not support picketing homes or places of business. People were also reporting that even people who were teacher supporters were having a negative reaction to the notion that we might do that. So, I did what I thought was prudent in terms of damage control. Agnes was very sheepish, and said "well, I only showed it to a few people" – but I don't think she'll be showing it any more. Just to keep you in the loop- I understand that you may disagree with the stance I took, but there it is.
> (School Board Exhibit 25)

40. When Cook reviewed this e-mail, this was the first time he was aware of the SBEA position on picketing.

41. School Board Members Beatty and Martin LaLonde did not believe that SBEA representatives had been involved with Cook's e-mail before it was sent. LaLonde and Beatty ultimately decided to support resuming negotiations with the SBEA subsequent to Town Meeting Day in part because they believed SBEA representatives had no involvement in the e-mail.

42. Wise had a conversation with Superintendent Everitt shortly after Town Meeting Day. Wise told Everitt that the SBEA was not going to picket Cassidy's office or home. SBEA did not make any public announcements that they did not intend to picket Cassidy's office.

43. On March 2, 2011, the South Burlington teachers held a strike vote and decided to engage in a strike the following week unless the parties reached agreement on

a successor collective bargaining agreement. The School Board and the SBEA subsequently decided to meet in negotiations.

44. Stone ultimately concluded it was a good thing that Cassidy was no longer involved in negotiations. He hoped Cassidy's absence would improve the chances of reaching an agreement. Boulanger welcomed Cassidy's absence from negotiations because he viewed him as an impediment to settlement.

45. The SBEA and the School Board resumed negotiations on March 7, 2011. They reached a tentative agreement covering the period July 1, 2010 to June 30, 2013, at this meeting. Included among its provisions were: a) 2.8% new money for teacher salary increases in 2010-2011, 2.1% in 2011-2012, and 2% in 2012-2013; b) teacher contributions of 15% (up from 12%) for health insurance premiums; c) continuation of step increases; and d) a requirement that the parties begin negotiations for a successor agreement by October 15, 2012, and if fact-finding was necessary, the fact-finder's report would be issued by June 30, 2013 (SBEA and Vermont-NEA Exhibit A).

46. Cassidy sent a letter to the School Board on March 11, 2011. In the letter, he indicated that if he "had the right to vote on the ratification of this agreement, I would vote no." He stated: "It is not fair to those in our community who have suffered layoffs, pay cuts, pay freezes or at least reductions in this recession to add to their tax burden to fund better compensation for our teaching staff. Nor would it be fair to make cuts in the quality of our programs to fund these compensation increases in an effort to avoid additional taxes." Cassidy indicated that he had supported a pay increase for the 2010-2011 school year equal to the increase in the tentative agreement, but stated that his support was "linked to (and in that sense in exchange for) language that would have

ended the requirement that the District provide step salary increases after the expiration of a contract and before a new contract had been agreed upon." He stated that the teachers were ready to strike rather than agree to give up the "bargaining advantage" of receiving step increases after expiration of a contract and before agreement on a successor agreement. Cassidy stated: "That would have been a serious hardship for many in our community. I never wished to see this occur, but I felt then – and I feel today – that the Board cannot effectively negotiate with the union unless it is willing to bear the pain and difficulty of a strike." He further expressed the opinion that "(t)he apparent compromise in the tentative agreement calling for negotiations to end by June 30 of the year in which a contract expires is not a real concession by the union." These comments by Cassidy were included in an article in the *The Other Paper* on March 17, 2011 (SBEA and Vermont-NEA Exhibit A).

47. The School Board voted 3 – 0 at its March 16, 2011, meeting to ratify the collective bargaining agreement between the SBEA and the School Board. Elizabeth Fitzgerald, Acting Chairperson of the School Board, did not vote (SBEA and Vermont-NEA Exhibit G).

MAJORITY OPINION

There is a threshold issue whether this case should be dismissed as moot. The SBEA and Vermont-NEA assert that the unfair labor practice charge should be dismissed as moot and non-justiciable because the parties have reached a collective bargaining agreement and there is no remaining actual case or controversy.

The School Board contends that the charge should not be dismissed as moot because the crux of the School Board's charge was not addressed in any way in the

collective bargaining agreement reached by the School Board and Association and the issues underlying the charge remain actively in dispute between the parties. The School Board contends that the alleged unfair labor practices are capable of repetition, yet evading review, because in the future Vermont-NEA could ascertain, then threaten to publicize, particular characteristics of other school board members that could create the appearance of conflicts. The School Board supports its position on mootness by pointing to the March 1, 2011, news release issued by Vermont-NEA as demonstrating that it would not hesitate to direct similar tactics toward members of other Vermont school boards in the future and thereby coerce and restrain school boards in selection of their collective bargaining representatives.

The Labor Relations Board and the Supreme Court have dismissed cases as moot or not justiciable in several cases where a teachers' association and a school board reached agreement on a collective bargaining contract pending the outcome of an unfair labor practice charge prompted by alleged actions occurring during contract negotiations. In these cases, the underlying dispute in the unfair labor practice charges was resolved by the parties agreeing to a collective bargaining contract.[1] The Court and Board concluded in these cases that no actual controversy or existing bona fide litigation existed between the parties.[2] The Board indicated in two of the cases that if a similar action occurred in a future round of negotiations, the Board would be able to review such action in a timely manner.[3]

---

[1] *Northwest Country Education Association v. Brighton School Board*, 135 Vt. 451 (1977). *Windsor Southwest Education Association v. Windsor School District Board of School Directors*, 11 VLRB 217 (1988). *Milton Staff Association/Vermont-NEA/NEA Local 130 v. Milton Board of School Trustees*, 17 VLRB 176, 177-78 (1994). *Arlington Educators Association, Vermont-NEA/NEA v Arlington Board of School Directors*, 18 VLRB 154 (1995).
[2] Id.
[3] *Windsor Southwest, supra. Milton, supra*.

In other cases, the Board has declined to dismiss charges as moot even though collective bargaining agreements had been finalized after the unfair labor practice charge was filed. In one case, the subject of the unfair labor practice charge was not raised by either party during contract negotiations and the new contract did not resolve the issue raised in the charge. The Board concluded under these circumstances that an actual controversy still existed between the parties which required resolution.[4] In another case, the Board declined to dismiss an unfair labor practice charge on mootness grounds where a union alleged in the charge that the unilateral adoption of rules and regulations during the course of contract negotiations was a refusal to bargain in good faith, and the parties had their negotiations dispute resolved pending Board decision on the charge. The Board concluded: "it is important to decide this issue since there is a continuing dispute between the parties over the right of management to promulgate rules and regulations during the course of negotiations. We believe this is the type of case which is 'capable of repetition, yet evading review' . . . and thus should not be dismissed as moot."[5]

It is important to summarize the legal framework and factual context of this case in considering whether to dismiss the charge before us as moot. The Labor Relations for Teachers Act requires, upon request of either party, the use of mediation and fact-finding to resolve negotiations disputes. It further provides that "all decisions of the school board regarding matters in dispute in negotiations shall, after full compliance with this chapter, be final".[6] In cases arising under the Teachers Act, the VLRB has held that the school board may not take unilateral action on matters in dispute until 30 days after receipt of

[4] *Castleton Education Association, Vermont-NEA v. Castleton-Hubbardton Board of School Directors*, 13 VLRB 60, 64-65 (1990).
[5] *Burlington Fire Fighters Association v. City of Burlington*, 4 VLRB 379, 384-85 (1981).
[6] 16 V.S.A. §§2006-2008.

the fact-finder's report. Once "finality" is invoked by a school board, the VLRB has determined that the duty to bargain terms of the contract for that year is ended.[7]

Under the Teachers Act, teachers also have a limited right to strike. The VLRB has determined that, upon construing the statutes relating to teacher labor relations, teachers have the same limited right to strike as municipal employees; a strike is permitted if it is timely and does not "endanger the health, safety or welfare of the public".[8] The VLRB has concluded, just as it has concerning the right of the school board to invoke finality, that the Vermont General Assembly intended at least a 30-day cooling off period after receipt of the factfinder's report before a strike is permitted.[9]

It is within this legal framework that the following events unfolded in this case. The School Board and the SBEA were parties to a collective bargaining agreement with a June 30, 2010, expiration date. The parties engaged in negotiations for a successor agreement to this agreement but were unable to successfully negotiate a successor agreement without outside assistance. The parties used mediation and fact-finding to seek to resolve their negotiations dispute. The fact-finder issued a recommendation on July 15, 2010, 15 days after expiration of the contract. The School Board maintained the status quo under the expired contract while the parties continued to negotiate. On February 16, 2011, the School Board voted to impose finality.

On February 25, 2011, Vermont-NEA Executive Director Joel Cook sent the e-mail at issue in the unfair labor practice charge before us to School Board Chair Richard

---

[7] *Chittenden South Education Association, Hinesburg Unit v. Hinesburg School District and Hinesburg School Board*, 8 VLRB 219 (1985); *Affirmed*, 147 Vt. 286 (1986).
[8] 21 V.S.A. §1730; *Green Mountain Union High School Board of Directors and Chester-Andover Elementary Union Board of Directors v. Chester Education Association and Vermont Education Association*, 2 VLRB 90, 99-101 (1979).
[9] Id.; *Rutland Schools*, 2 VLRB 250, 266-273 (1979).

Cassidy. Cook included the following statement in the e-mail: "the immediate future appears to be one that includes labor unions picketing the offices of Phil Hoff and Dave Curtis, and, frankly, I don't want that to happen." On February 28, 2011, Cassidy issued a statement recusing himself from "any further vote or discussions relating to the imposition of a contract for this year" on the basis of the reference to picketing his office contained in Cook's e-mail. On March 1, 2011, Vermont-NEA published a news release which included the statement: "Inevitably, one of the tools used by unions in a strike is picketing, and it is not uncommon for board members' businesses to be picketed during a strike. Mr. Cook merely pointed that out to Mr. Cassidy".

On March 2, 2011, the South Burlington teachers held a strike vote and decided to engage in a strike the following week unless the agreement was reached on a successor agreement. The parties held a negotiations meeting on March 7, 2011, and reached a tentative agreement on a successor agreement to the agreement which expired on June 30, 2010. The agreement was subsequently ratified by the School Board and SBEA.

In considering this legal framework and factual context, we conclude that this case is more in line with the cases declining to dismiss charges on mootness grounds than the cases dismissing charges as moot or not justiciable. The underlying issues in the unfair labor practice charge – i.e., the propriety of the e-mail sent by Cook to Cassidy on February 25 – were not raised by either party during contract negotiations and the new contract did not resolve the issues raised in the charge. It is important to decide these issues since there is a continuing dispute between the parties over the statement made by Cook in the e-mail concerning unions picketing Cassidy's office.

Further, this e-mail was sent during a timeframe which made it impractical to have the unfair labor practice charge resolved prior to a collective bargaining agreement being reached. It was sent shortly after the School Board had decided to unilaterally impose terms and conditions of employment on teachers and less than a week before the teachers took a vote to strike the following week unless agreement was reached. Under these circumstances, an actual controversy still exists between the parties which requires resolution.[10] This is the type of case which is "capable of repetition, yet evading review", and thus should not be dismissed as moot.

We turn to addressing the specific allegations made by the School Board in its unfair labor practice charge. The School Board first alleges that the SBEA and Vermont-NEA violated 21 V.S.A. § 1726(b((2) through the sending of an e-mail by the Vermont-NEA Executive Director to the School Board Chairperson restraining and coercing the School Board in its selection of representatives for the purposes of collective bargaining by inappropriately creating an appearance of a conflict of interest for the School Board Chairperson. Section 1726(b)(2) makes it an unfair labor practice for an employee organization or its agents to "restrain or coerce an employer in the selection of representatives for the purpose of collective bargaining".

The School Board contends the SBEA and Vermont-NEA violated Section 1726(b)(2) when they jointly prepared and sent an e-mail to School Board Chairperson Cassidy containing in substance a threat that unions would picket Cassidy's law office unless he convinced the School Board to return to the bargaining table. The School Board asserts that the SBEA and Vermont-NEA knew, must have known, or should have known

[10] *Castleton Education Association, Vermont-NEA v. Castleton-Hubbardton Board of School Directors*, 13 VLRB at 64-65.

this threat would create the appearance of a conflict of interest such that Cassidy would be required to recuse himself from negotiations. The SBEA and Vermont-NEA contend that no restraint or coercion occurred here concerning the retention of Cassidy on the School Board's negotiating team.

Before addressing the merits of this charge, we first discuss what is not involved in this case. The School Board contends that the legality of picketing is not an issue in this case because there was no picketing and there never was any plan to picket; there was only the threat to picket. The School Board's focus is on the legality of the threat as it occurred under the specific facts of this case. The School Board contends that restraining and coercing a party with a threat of even, *arguendo*, lawful activity would still violate Section 1726(b)(2). Thus, we are not deciding the legality of picketing at a school board member's place of business in this matter.[11]

There also is a preliminary issue as to whether the SBEA was involved in the sending of the e-mail. Although SBEA co-Presidents Buley and Wise informed a School Board member shortly after the sending of the e-mail that the SBEA had nothing to do with the e-mail and did not support it, the evidence belies such assertion. Cook sent Wise a draft of the e-mail before sending it to Cassidy to see if SBEA approved of it. Wise responded to the e-mail within an hour, informing Cook: "Send it. It's awesome – and we appreciate the support very much." We note that there is no evidence that Buley supported the sending of the e-mail, since she did not receive a copy of it until after Wise

[11] The Vermont School Boards Association ("VSBA") asserts in its post-hearing memorandum of law that picketing a public official's residence is an unfair labor practice. However, since the School Board indicates in its unfair labor practice charge that the legality of picketing is not at issue in this case, we are not deciding the legality of picketing at a school board member's place of business in this matter. The VSBA also asserts that picketing at the home or office of a board member is not constitutionally protected speech, and that public policy considerations support a prohibition on picketing of school board member homes and workplaces. We do not need to resolve these issues to address the allegations made by the School Board in its unfair labor practice charge. Thus, we do not discuss them in our decision.

had sent his response to Cook and it is undetermined when Buley actually reviewed the draft of the e-mail. Nonetheless, Wise's express approval to Cook to send the e-mail indicates SBEA involvement in sending it.

The School Board has the burden, as the charging party, of proving by a preponderance of the evidence that the SBEA and Vermont-NEA restrained and coerced the School Board in its selection of representatives for the purposes of collective bargaining in violation of 21 V.S.A. § 1726(b((2) through Cook sending the e-mail to Cassidy by inappropriately creating an appearance of a conflict of interest for him.[12] In meeting this burden, the School Board must show by direct or circumstantial evidence that the SBEA and Vermont-NEA acted with the intent to seek Cassidy's removal from involvement in the dispute over the successor collective bargaining agreement by creating the appearance of a conflict of interest for him.

We conclude that the School Board has not met this burden. Cassidy removed himself from the dispute between SBEA and the School Board based on the School Board's conflict of interest policy. There is no evidence that any SBEA leader or activist was aware of the School Board's conflict of interest policy at the time Cook since his e-mail to Cassidy. Cook and David Boulanger, the Vermont-NEA Uniserv Director involved in the dispute between the SBEA and the School Board, were not aware of the conflict of interest policy. Also, Cook and Boulanger did not discuss the issue of Cassidy's conflict of interest, and neither of them discussed the issue with SBEA leaders or activists, prior to Cook sending the February 25 e-mail to Cassidy.

It is true that SBEA and Vermont-NEA representatives viewed Cassidy as a major impediment to the progress of negotiations. Also, the SBEA chief negotiator hoped

[12] Section 35.13, Labor Relations Board Rules of Practice; *Castleton, supra*, at 66; 21 V.S.A. § 1727(d).

Cassidy's absence would improve the chances of reaching an agreement and Boulanger welcomed Cassidy's absence because he viewed him as an impediment to settlement. Nonetheless, the holding of these views without further evidence does not translate into a determination that SBEA and Vermont-NEA acted with the intent to seek Cassidy's removal from involvement in the dispute over the successor collective bargaining agreement by creating the appearance of a conflict of interest for him. The School Board failed to produce such evidence.

The e-mail message sent by Cook to Cassidy was an attempt to persuade Cassidy to change the School Board's position to impose terms and conditions of employment. Cook sought a return to negotiations that hopefully would result in a collective bargaining agreement and avert a strike. It is in the context of a looming strike that Cook's statement about union picketing of Cassidy's office was made.

The School Board has not established that Cook made such statements to create the appearance of a conflict of interest for Cassidy so that he would be removed from the dispute. Instead, the fairest reading of the evidence was that Cook was acting in a high-stakes and time-sensitive situation to seek to put pressure on the person viewed by the SBEA and the Vermont-NEA as the biggest impediment to a settlement to change his position and hopefully avert a strike. As the Vermont Supreme Court has stated: "We recognize that a strike is not a game of tiddlywinks played according to the rules of a Victorian salon."[13] Cook's statement about picketing was an aggressive tactic in a serious labor dispute, but did not constitute restraint or coercion of the School Board concerning the retention of Cassidy on the School Board's negotiating team.

[13] *Hinesburg School District v. Vermont-NEA*, 147 Vt. 558, 562 (1986).

We also note that the School Board is seeking to hold the SBEA and the Vermont-NEA liable based on a conflict of interest policy adopted by the School Board which requires a School Board member to not participate in an issue in which the member has a conflict of interest or the appearance of a conflict of interest. The School Board failed to prove that it could not have administered its conflict of interest policy judiciously and still allowed Cassidy to remain involved in negotiations. Further, the School Board has failed to demonstrate that it has fully explored whether it could have adopted a different conflict of interest policy which would comply with state law, allow effective governance, and substantially reduce the ability of a party to take actions causing the disqualification of a School Board member in a controversy. If this cannot be accomplished, then Vermont's local governments have a systemic problem that is beyond the jurisdiction of this Board to resolve.

The School Board next contends that the Association and Vermont-NEA engaged in a failure to negotiate in good faith in violation of 21 V.S.A. §1726(b)(4) by the Vermont-NEA Executive Director making express and implied threats in the e-mail to the effect that the SBEA and/or Vermont-NEA would cause harm to the School Board Chairperson's personal livelihood by picketing his office and causing him to lose union business unless he convinced the School Board to succumb to their demands. The School Board contends that school board members in Vermont should not have to accept the prospect of being subjected to personally-directed threats and intimidation as part of their public service, and that conduct of this sort should not be tolerated and should be found to constitute a failure to bargain in good faith.

The SBEA and Vermont-NEA respond that the February 25, 2011, e-mail does not constitute a failure to bargain in good faith pursuant to Section 1726(b)(4) because the duty to bargain had terminated when the School Board imposed terms and conditions of employment on teachers on February 16, 2011, pursuant to 16 V.S.A. § 2008. The SBEA and Vermont-NEA assert that, as the negotiation process required by statute had ended, there was no further obligation for either party to negotiate with the other.

In determining whether the SBEA and Vermont-NEA violated Section 1726(b)(4), this section must be considered together with other applicable sections of the Labor Relations for Teachers Act and the Municipal Employee Relations Act. The Teachers Act provides: "The negotiations councils of the school board and of the recognized teachers' or administrators' organization shall meet together at reasonable times, upon request of either party, and shall negotiate in good faith on all matters properly before them under the provisions of this chapter."[14]

This mutual obligation to negotiate in good faith is enforced by subsections of the unfair labor practice provisions of the Municipal Employee Relations Act which are applicable to school boards and teachers' organizations[15] and which mirror each other. The provision in Section 1726(b)(4) making it an unfair labor practice for an employee organization and its agents to "refuse to bargain collectively in good faith" with an employer is matched by the provision in Section 1726(a)(5) making it an unfair labor practice for an employer to "refuse to bargain collectively in good faith with the exclusive bargaining agent."

[14] 16 V.S.A. § 2001
[15] See 21 V.S.A. § 1735.

These statutory provisions creating and enforcing the mutual obligation to negotiate in good faith constitute the general framework in which to analyze in this case the specific provision of Section 2008 of the Teachers Act that "(a)ll decisions of the school board regarding matters in dispute in negotiations shall, after full compliance with this chapter, be final." In *Chittenden South Education Association, Hinesburg Unit v. Hinesburg School District and Hinesburg School Board*[16], the Board stated:

> Once "finality" is invoked under § 2008, the duty to bargain terms of the contract for that year is ended. The clear purpose of § 2008, which has no parallel we know of in either the private or public sector, is to put an end to the negotiations process. It designates a point in time when mandatory negotiations will conclude for that year. . .
>
> Of course, this does not mean school boards may not negotiate further once they have imposed finality. The pressure of a strike may cause a school board to agree to provisions different than its unilaterally-imposed policy to settle a strike and get teachers back to work.[17]

Thus, the mutual obligation to negotiate in good faith ends for both the school employer and the association representing teachers when the employer invokes finality under Section 2008. The parties may continue negotiations after this point but there is no obligation to do so.

Given these statutory provisions and caselaw precedent, we consider whether the statutory provisions making it an unfair labor practice for an employee organization and employer to refuse to bargain collectively in good faith are applicable during the period after a school board has imposed finality pursuant to Section 2008 and there are no mutual plans by the parties to resume negotiations.

The possibility that negotiations may not resume is insufficient to remove actions of the parties during this period from a requirement to proceed in good faith. This is a

[16] 8 VLRB 219 (1985); *Affirmed*, 147 Vt. 286 (1986).
[17] 8 VLRB at 247 (emphasis in original).

crucial period where events proceed quickly, the stakes are high, and pressures are brought to bear on the parties which may result in the resumption of negotiations. The events of the case before us are illustrative. The e-mail in this matter was sent shortly after the School Board had decided to unilaterally impose terms and conditions of employment on teachers and less than a week before the teachers took a vote to strike the following week unless agreement was reached. The ongoing nature of a labor relations dispute during this critical period and the statutory charge of the Board to referee the collective bargaining process result in the Board having continuing oversight of actions of the parties.

In sum, we conclude that the provisions making it an unfair labor practice for an employee organization and employer to refuse to bargain collectively in good faith are applicable during this period because there is a potential for negotiations to resume, but our review is tempered by the recognition that the mutual obligation to negotiate has ended. The parties are required to act in good faith with the understanding that it is possible negotiations will be resumed.

We consider the e-mail sent by Vermont-NEA Executive Director Cook in this light. At the time he sent the e-mail, the School Board had imposed terms and conditions of employment pursuant to Section 2008, thus ending the mutual obligation to bargain in good faith, and the School Board had not indicated interest at that time in negotiating further. The School Board contends that the sending of the e-mail violated §1726(b)(4) through making express and implied threats that the SBEA and/or Vermont-NEA would cause harm to School Board Chairperson Cassidy's personal livelihood by picketing his

office and causing him to lose union business unless he convinced the School Board to succumb to their demands.

The School Board has the burden of proving that the statement concerning picketing the School Board Chairperson's office constituted a violation of §1726(b)(4). We conclude that the School Board has not met the burden of establishing that Cook failed to act in good faith in making this statement. The School Board is not alleging that the picketing would have been illegal. Further, as discussed above, the e-mail message sent by Cook to Cassidy was an attempt to persuade Cassidy to change the School Board's position to impose terms and conditions of employment. Cook sought a return to negotiations that hopefully would result in a collective bargaining agreement and avert a strike. Cook's statement about picketing was an aggressive tactic in a serious labor dispute but the School Board has not demonstrated that it was made in bad faith.

The School Board further contends that the actions of the SBEA and Vermont-NEA amounted to a failure to bargain in good faith in violation of Section 1726(b)(4) in that the threatening e-mail was made through direct, *ex parte* contact with the School Board Chairperson in violation of the parties' negotiation ground rules regarding designated representatives and spokespersons and without permission of the School Board's legal counsel.

The SBEA and Vermont-NEA assert that since the ground rules were in effect only during the period of negotiation, and the February 16, 2011, imposition of finality ended negotiations, the ground rules became moot and ineffective as of that date. The SBEA and Vermont-NEA contend that there was no violation of the duty to bargain in good faith through the February 25, 2011, e-mail since Cook sent his e-mail after the

ground rules no longer applied and there was no duty to bargain whatsoever. The SBEA and Vermont-NEA further contend that, even if there was a duty to bargain, the duty to bargain was not violated because the parties engaged in other communications with each other or through public statements outside of negotiations which they did not consider to be barred by the ground rules.

We conclude that the School Board has not demonstrated that the SBEA and Vermont-NEA refused to bargain collectively in good faith in violation of Section 1726(b)(4) and the parties' negotiations ground rules through issuance of the February 25, 2011, e-mail. The ground rules negotiated by the parties are directed to designating spokespersons and establishing protocols for meetings of the parties when they are engaging in negotiations. They do not address communications between the parties outside of negotiations meetings. Cook sent the e-mail after the School Board had imposed terms and conditions of employment pursuant to Section 2008, and there were no negotiations meetings scheduled. We conclude that the negotiations ground rules are not applicable to such a communication occurring outside of meetings of the parties engaging in negotiations.

Our conclusion in this regard is reinforced by the parties' own actions with respect to the e-mail communications between Cassidy and SBEA Co-President Wise a few days prior to the imposition of finality by the School Board. In this e-mail exchange, Cassidy, who was not the School Board negotiations spokesperson, and Wise, who also was not a negotiations spokesperson, made reference to the negotiations. There is no claim by either party that there was a violation of negotiations ground rules by this communication outside of formal negotiations.

There is one other issue to address. The School Board contends in its post-hearing brief that the SBEA violated its duty to bargain in good faith by being dishonest to School Board members with respect to its involvement in the e-mail sent by Cook. This specific allegation is not contained in the charge filed by the School Board.

It would be unfair and prejudicial to the SBEA for the Board to consider the merits of this allegation. Section 35.3 of the Board *Rules of Practice* requires that an unfair labor practice charge contain a "concise statement alleging the applicable sections of the Act which are alleged to have been violated and a brief statement of facts concerning the alleged violations." This provides the party responding to the charge with notice as to alleged violations so as to adequately respond to them and prepare a defense.

If we permitted parties to raise issues for the first time in a post-hearing brief, then the Labor Relations Board would not have the opportunity to decide whether to issue a complaint on the issue, and the responding party would lack notice and would be left without an opportunity to fully present evidence and argument on the issue. We decline to permit such a result.[18]

We recognize that the underlying factual basis for the School Board's contention that the SBEA was dishonest to School Board members with respect to its involvement in the e-mail sent by Cook was not known by the School Board until the discovery process after the unfair labor practice charge was filed. The School Board could have timely presented its allegation that the SBEA violated its duty to bargain in good faith due its actions by amending the unfair labor practice charge pursuant to Section 32.7 of Board *Rules of Practice*, which provides that "(t)he Board, upon application by the moving

[18] *Teamsters Local 597 v. Green Mountain Transit Agency, Green Mountain Transit Agency v. Teamsters Local 597*, 27 VLRB 128, 143-44 (2004).

party and by notice to all interested parties . . . may permit amendment (of the charge) as it deems proper." This would have provided notice to SBEA as to the alleged violations so it could adequately respond to them and prepare a defense. It also would have provided an opportunity for the Labor Relations Board to decide whether to issue a complaint on the issue. The School Board's failure to so amend its charge precludes our consideration of this allegation now.

Although we decline to address whether SBEA actions in this regard violated its duty to bargain in good faith, we note that the actions of SBEA co-President Wise in this regard could be detrimental to future labor relations with the School Board. As discussed above, the evidence indicates that Wise informed a School Board member shortly after the sending of the e-mail that the SBEA had nothing to do with the e-mail and did not support it. The evidence belies such assertion. Cook sent Wise a draft of the e-mail before sending it to Cassidy to see if SBEA approved of it, and Wise approved of it. Wise's approval to Cook to send the e-mail indicates SBEA involvement in sending it. The lack of forthrightness by Wise with a School Board member in acknowledging his involvement in the e-mail was not conducive to furthering a productive relationship with the School Board.

/s/ Richard W. Park

_____

Richard W. Park, Chairperson

/s/ Gary F. Karnedy

_____

Gary F. Karnedy

CONCURRING OPINION

I concur with my colleagues that the School Board has not demonstrated that the SBEA and Vermont-NEA committed any unfair labor practices in this matter. Nonetheless, I submit this separate concurring opinion because I disagree with some of the reasoning of the majority in reaching their conclusions.

First, although I agree with my colleagues that the School Board has failed to meet its burden of proving that the SBEA and Vermont-NEA restrained and coerced the School Board in its selection of representatives through Cook sending the e-mail to Cassidy, the majority opinion has unnecessarily extended its discussion on this issue by indicating how the School Board could have better administered or crafted its conflict of interest policy to avoid the withdrawal of Cassidy from negotiations. These comments are extraneous to deciding the unfair labor practice issue before the Board, and I do not join in their inclusion in the opinion.

I next diverge from my colleagues' views in considering the School Board's allegation that the SBEA and Vermont-NEA refused to bargain collectively in good faith in violation of Section 1726(b)(4) through issuance of the February 25, 2011, e-mail. The majority opinion holds that the statutory provisions making it an unfair labor practice for an employee organization and employer to refuse to bargain collectively in good faith are applicable during the period after a school board has imposed finality pursuant to Section 2008 and there are no mutual plans by the parties to resume negotiations.

I disagree. In so concluding, the majority has extended the coverage of Section 1726(b)(4) beyond what the Vermont General Assembly enacted. The majority view that the Board has continuing oversight during this period given the statutory charge of the

Board to referee the collective bargaining process is at odds with the statutory scheme established in statute.

Given the statutory provisions and case law precedent set forth in the majority opinion concerning the mutual obligation to negotiate in good faith, I conclude that the SBEA and Vermont-NEA did not refuse to bargain collectively in good faith in violation of Section 1726(b)(4) through issuance of the February 25, 2011, e-mail because there was no obligation at that time to negotiate in good faith concerning a successor collective bargaining agreement to the 2008-2010 agreement. The School Board had imposed terms and conditions of employment pursuant to Section 2008, thus ending the mutual obligation to bargain in good faith, and the School Board had not indicated interest at that time in negotiating further.

It would be contrary to the mutual obligation to negotiate in good faith established by statute to consider one party to have violated a duty to bargain in good faith at a time when the other party had no such duty. Stated another way, when a school board has imposed finality pursuant to Section 2008, as occurred here, it cannot prevail on a claim that the union has violated its duty to bargain in good faith with respect to terms and conditions of employment that the school board has imposed.

This conclusion is not altered by the fact that the parties ultimately returned to the table and successfully negotiated a successor collective bargaining agreement. The pertinent consideration in determining whether the February 25, 2011, e-mail violated the duty to bargain in good faith is whether such a duty existed at the time the e-mail was issued. It was not foreordained at that time that the parties would return to negotiations.

Although this was possible, it also was possible that the School Board would insist on adhering to its imposed terms and conditions of employment.

I likewise have a different view than my colleagues on the rationale for concluding that the SBEA and Vermont-NEA did not refuse to bargain collectively in good faith in violation of negotiation ground rules through issuance of the February 25, 2011, e-mail. I so determine because there was no obligation at that time to negotiate in good faith. The ground rules negotiated by the parties provided that they "shall apply to their negotiations for a successor collective bargaining agreement to the Agreement expiring June 30, 2010". Cook sent his e-mail at a time when the ground rules were not applicable because the School Board had imposed terms and conditions of employment pursuant to Section 2008. This ended the mutual obligation to negotiate for a successor agreement to the 2008-2010 agreement, and the School Board had not indicated interest at that time in negotiating further. Also, for the reasons set forth above, this conclusion is not altered by the fact that the parties ultimately returned to the table and successfully negotiated a collective bargaining agreement.

Finally, while I agree with my colleagues that it would be unfair and prejudicial to the SBEA to consider the merits of the School Board allegation that the SBEA refused to bargain in good faith by being dishonest to School Board members with respect to its involvement in the e-mail sent by Cook, I do not agree with their further comments critical of SBEA co-President Wise concerning this issue. Although the majority opinion holds that it would be unfair and prejudicial to the SBEA for the Board to consider the merits of this allegation, it contradicts this conclusion by finding fault with Wise's

actions. Again, these comments are extraneous to deciding the issues appropriately before the Board, and I do not join in their inclusion in the opinion.

/s/ James C. Kiehle

James C. Kiehle

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the unfair labor practice charge filed by the South Burlington Board of School Directors in this matter is dismissed.

Dated this 13th day of March, 2012, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ James C. Kiehle

James C. Kiehle

/s/ Gary F. Karnedy

Gary F. Karnedy